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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1488

ROGERS C. B. MORTON,
SECRETARY OF INTERIOR,
Appellant,

v.

STATE OF NEW MEXICO, *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRIEF OF AMICUS CURIAE THE HUMANE SOCIETY OF THE UNITED STATES

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CONSENT

The Humane Society of the United States has obtained written consent to file a brief as amicus curiae from Appellant and Appellees, pursuant to Sup. Ct. R. 42 ¶2.

INTEREST OF AMICUS CURIAE

Amicus curiae, the Humane Society of the United States, is a non-profit charitable corporation with principal offices in Washington, D.C. and regional offices throughout the United States. It has active members in every state who share a commitment to the prevention of cruelty to animals, the promotion of all aspects of animal welfare and to the integrity of the natural environment.

The Humane Society of the United States has been actively involved in the problems surrounding wild horses and burros in this country for several years. In 1968, the Society sued the Bureau of Land Management of the Department of the Interior to prevent the mass removal and disposal of the wild horse herds of the Pryor Mountain Range in Montana and Wyoming, a suit which led to the establishment of the Pryor Mountain Horse Sanctuary. In 1973, the Society, as co-plaintiff with the American Horse Protection Association, again sued the Bureau of Land Management in an effort to compel compliance with and enforcement of the Wild Free-Roaming Horses and Burros Act of 1971. The Society has continued to monitor government programs concerning wild horses and burros.

INTRODUCTION

In February, 1975, a three-judge District Court for the District of New Mexico declared the Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. §§1331 *et seq.* (Supp. II, 1972), unconstitutional, ruling that it exceeded the power granted to Congress under Article IV, §3 (the Property Clause) of the Constitution of the United States. Amicus curiae, the Humane Society of the United States,

urges the reversal of that decision and, to that end, respectfully submits the arguments that follow for the Court to consider in addition to those of the Federal Appellant.

ARGUMENT

I

THE POWER OF CONGRESS TO CONTROL USE OF THE PUBLIC LANDS INCLUDES THE POWER TO DESIGNATE BROAD PUBLIC USES OF THE LANDS, INCLUDING THE PROTECTION AND MANAGEMENT OF WILD HORSES AND BURROS.

The limits of Congressional power over federal lands under Article IV, Section 3 of the Constitution, have never been fully defined by this Court. Nor, it is submitted, has Congress ever legislated to the full extent of its powers under the Property Clause. "Federal law is generally interstitial in nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. . . . . Federal legislation, on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objectives." Hart and Wechsler, *The Federal Courts and the Federal System*, 470-471 (1973). Nevertheless, it is well established that Congressional inaction does not indicate a lack of Congressional power. Congress is under no obligation to legislate in a given field to the full extent of its power. *Second Employers' Liability Cases*, 223 U.S. 1, 54-55 (1912). And the fact that state law has traditionally occupied a field is no bar to Congress belatedly exerting the full extent of its enumerated powers under the Constitution, even though state law may be displaced as a result. Federal law prevails over any conflicting state law under the Supremacy Clause. *Id.*

While it has been said that the power of Congress over the public domain is plenary, exclusive, and without limit (*United States v. San Francisco,* 310 U.S. 16, 29 (1940)) it is apparent that that power must stop short of an assumption of sovereignty over federal lands, sovereignty which is held by the states under the terms of their admission to the Union and under the scheme of our federalism. Conversely, a federal encroachment upon a now-absolute state sovereignty over federal lands is *not* at issue here, for past decisions of this Court have recognized that the states' sovereignty over federal lands is, in effect, a qualified sovereignty resulting from the ownership and presence of the co-existent federal sovereign within state boundaries. State powers of taxation, a sure incident of sovereignty, do not extend over federal land. *Van Brocklin v. Tennessee,* 117 U.S. 151 (1886). State police power is applicable to federal lands only so long as that power does not conflict or is inconsistent with applicable Congressional enactments. *McKelvey v. United States,* 260 U.S. 353, 359 (1922); *see also, Texas Oil and Gas Corp. v. Phillips Petroleum Co.,* 277 F. Supp. 366, 368-369 (W.D. Okla. 1967).

In *Utah Power and Light Co. v. United States,* 243 U.S. 389 (1917), this Court made its most decisive statement on the nature and extent of Congressional power over public lands:

> Not only does the Constitution (art. 4, §3, cl. 2) commit to Congress the power "to dispose of and make all needful rules and regulations respecting" the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court, have gone

> upon the theory that the power of Congress is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a state has civil and criminal jurisdiction over lands within its limits belonging to the United States, *but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in which manner others may require rights in them.*
>
> 243 U.S. at 404 (emphasis added).

It is submitted that the power of Congress to control the "use" of the public lands means more than putting such lands at the disposal of local agricultural or commercial interests for purposes of grazing, mining and so forth. There are broader public uses which are well within the Congressional power both to allow and to effectuate on behalf of the American public, and among such uses is the protection and management of wild horses and burros, which, as the Senate Committee declared, "belong to all of the American people . . . [and] are living symbols of the rugged independence and tireless energy of our pioneer heritage." S. Rep. No. 92-242, 92d Congress 1st Sess. (1971), in *1971 U.S. Code Cong. and Admin. News* 3553.

II

STATE JURISDICTION OVER WILDLIFE ON FEDERAL LANDS ARTIFICIALLY SEPARATES CONTROL OF WILDLIFE FROM CONTROL OF HABITAT, AND, FROM THE STANDPOINT OF SOUND MANAGEMENT OF PUBLIC LANDS, IS AN UNWORKABLE DOCTRINE.

Appellees and the state amici curiae seek to limit congressional control of property belonging to the United States to real property, excluding control of wildlife thereon except for incidental purposes of protecting the land. Appellees and the state amici curiae ground this assertion upon ancient notions of the state as the owner-in-trust of wildlife for the people and of state regulation of wildlife under the police power. Such a bifurcation of wildlife from real property is a concept predating our understanding of the interaction between wildlife and its habitat.

The United States, by exercising its real property rights to which the states presently admit, can manipulate the food supply which the habitat provides and thereby control reproduction rates of the resident wildlife. The United States by exerting its rights as a landowner can, at least in theory, exclude all competing uses such as grazing; it can preclude any harvesting of wildlife by forbidding trespass on its lands. *Light v. United States,* 220 U.S. 523, 536 (1911). All of these actions are, in effect, management or regulation of resident wildlife. T. Hammond, "The Controversy Over Wildlife Jurisdiction, 1964-1970", 15-16 (1971).[1]

[1] Unpublished thesis available through the Colorado Division of Game, Fish and Parks.

Judged from the objective of responsible management of natural resources on federal lands for the general public good, the separation of jurisdiction over wildlife from jurisdiction over land is an unworkable doctrine. What is needed is the unified management of the whole ecology of federal lands. The bifurcation of control which the District Court's decision stands for is as artificial and as absurd both from a practical and legal standpoint, as was the distinction between federal riparian rights and the electricity produced therefrom urged upon this Court in *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288 (1936). It is time to broaden the meaning of the Congressional power to regulate property belonging to the United States within the Property Clause, to take into account contemporary notions of responsible environmental management.

III

THE ACT DOES NOT TRANSMUTE WILD HORSES AND BURROS INTO FEDERAL PROPERTY NOR DOES IT EXTEND FEDERAL JURISDICTION OVER ALL WILD HORSES AND BURROS REGARDLESS OF ORIGIN, THEREBY STAYING WITHIN CONSTITUTIONAL LIMITS.

The three-judge District Court apparently interpreted the Act as converting wild horses and burros into federal property by contact with federal lands. Memorandum Opinion of the Three-Judge District Court, *New Mexico v. Morton,* Civil No. 74-127 (D.N.M., Feb. 28, 1975), reprinted in Appellant's Jurisdictional Statement, Appendix A, p. 4a. Similarly, Appellees have contended that the Act asserts exclusive possessory rights to all unbranded horses and

burros regardless of origin, which at any time set foot on federal property, so being "transmuted" into federal property and therefore subject to the Act. Amicus curiae, the State of Idaho, in its brief (at pages 4-5) also described the effect of the Act in the same terms.

Such assertions can only be derived from a strained interpretation of the Act. The law is not an ass (whatever the subject matter of this particular Act may be). The Act nowhere speaks of the animals as federal "property" or deals with them in terms of "ownership". The Act speaks in terms of "jurisdiction", "protection" and "management", all of which are in the nature of regulation, not ownership. And by any reasonable reading, the Act seeks to regulate only those wild free-roaming horses and burros originally residing on public lands as of the date of the Act, and their offspring. The Act's preamble refers to its objects of protection as "integral part(s) of the public lands." 16 U.S.C. §1331 (Supp. II, 1972). Section 2(b) of the Act defines wild free-roaming horses and burros as "all unbranded and unclaimed horses and burros on *public lands* of the United States." 16 U.S.C. §1332 (b) (emphasis added). This definition, of course, must be read into every other clause wherein the term "wild free-roaming horses and burros" appears.

The language of Section 4 (16 U.S.C. §1334), which is as follows:

> Nothing in this section shall be construed to prohibit a private landowner from maintaining wild free-roaming horses or burros on his private lands, or lands leased from the Government, if he does so in a manner that protects them from harassment,

> and if the animals were not willfully removed or enticed from the public lands. Any individuals who maintain such wild free-roaming horses or burros on their private lands or lands leased from the Government shall notify the appropriate agent of the Secretary and supply him with a reasonable approximation of the number of animals so maintained.

was certainly meant to deal with the situation where wild free-roaming horses and burros wander off public lands onto private lands.

While wild free-roaming horses and burros retain their character as federal protectees if they wander off federal lands, otherwise private horses and burros, even though unbranded, are not instantly transmuted into federal property or into federal protectees by wandering onto federal lands.[2] Rather, the question of ownership of such horses is left to state substantive law under Section 5 of the Act (16 U.S.C. §1335).

Thus, the extravagant and clearly unconstitutional qualities attributed by Appellees to this Act do not hold up under any reasonable reading and are not in fact part of the law as written. Furthermore, the longstanding policy of this Court is to construe legislation, if consistent with the will of Congress, so as to preserve its constitutionality.

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[2] The regulations promulgated under the Act by the Bureau of Land Management specifically exclude from the definition of "wild free-roaming horses and burros", "any horse or burro which entered or was introduced onto public lands after December 15, 1971, by accident, negligence, or willful disregard of ownership." 43 C.F.R. §4710.0-5(b) (1974).

Regional Rail Reorganization Act Cases, 419 U.S. 102, 134 (1974).

IV

THE ACT CONSTITUTIONALLY APPLIES TO GENERAL PUBLIC DOMAIN. THE ALLEGED NEED FOR SPECIALIZED WITHDRAWAL OR RESERVATION HAS NO BASIS IN LAW.

Appellees, the State of New Mexico *et al*, contend in their Motion to Dismiss or Affirm (at pages 12-14) that the Act is crucially flawed in that it applies to the general public lands, that is, those which are still subject to sale and general use, rather than to land purchased, withdrawn or reserved as sanctuaries for wild horses and burros; that a "great difference in federal jurisdiction . . . exists between the two categories" of federal lands; and that the present litigation would be unnecessary had Congress instead withdrawn specific parcels of land from the general public domain to be used as horse and burro sanctuaries.

While the authorities cited at pages 13-14 of Appellees' Motion to Dismiss or Affirm admit to the distinction between general public lands and lands withdrawn, reserved or purchased for a particular use, none of those authorities stand for the proposition or hold that Congressional authority under the Property Clause is somehow greater over reserved or withdrawn lands than over general public lands[3] or that the nature of Congressional authority over

[3] The degree of federal jurisdiction over purchased land is not relevant to this discussion since any wild horse or burro sanctuaries would be created from lands already in the public domain.

federal lands vis-a-vis the state police power is in any way different with respect to general public lands than with respect to lands withdrawn or reserved.

Withdrawal or reservation automatically insulates withdrawn or reserved lands from statutes applicable to general public lands, statutes which, but for the withdrawal, would otherwise apply to the withdrawn lands. But withdrawal or reservation alone, without a cession of jurisdiction by the state, does not augment federal jurisdiction or change the nature of Congressional authority under the Property Clause over the withdrawn lands. *See, FPC v. Oregon*, 349 U.S. 435, 448 (1955); *cf., United States v. Gratiot*, 14 Pet. 526, 536-537 (1840).

The statutes enabling withdrawal for special purposes usually provide for quick reclassification back to general use status, belying any magic distinction in jurisdiction resulting from withdrawal. *See, e.g.*, The Pickett Act, 43 U.S.C. §145 (1970) and the National Wildlife Refuge System Act, 16 U.S.C. §668dd(a) (1970).

Furthermore, while Appellees assert that "The purposes of the Act could have been, and can yet be, constitutionally satisfied by withdrawal and reservation of specific parcels of land for wild burro and horse sanctuaries and refuges" (Motion to Dismiss or Affirm, p. 14), they also assert that what really saves existing federal statutes providing for land withdrawal for purposes of wildlife protection is the insertion of "express language maintaining the traditional powers of the states over wild animals upon the federal lands which are the subject of the statute. . ." (Motion to Dismiss or Affirm, p. 15). The idea that reservation or withdrawal of lands is a cure-all in this

controversy is an illusion. If Congress had created wild horse and burro sanctuaries by withdrawing lands but had not inserted a clause reconciling federal property power with the alleged state police power over wildlife, the basis for the present challenge would still exist. More importantly, it should be recognized that the fears expressed by the Federal Appellant at footnote 4, page 9 of its Jurisdictional Statement are justified, that if the Appellees' position is upheld by this Court, several existing statutes (at least, those grounded on the Property Clause) providing for the protection of wildlife on federal lands would be rendered constitutionally unsound whenever their application conflicted with state police regulations.

V.

THE ACT CAN BE GROUNDED AT LEAST IN PART UPON INHERENT POWER RESIDING IN THE NATIONAL SOVEREIGN TO DEAL WITH PROBLEMS OF NATIONAL SCOPE AND CONCERN.

Throughout this century, the federal government has had to deal with wildlife-related problems with which the states have either been unwilling or unable to cope, problems such as the preservation of large tracts of land for park and refuge purposes, comprehensive protection of whole species, and the protection of migratory, interstate waterfowl. Too often the nature of local or state political processes simply precludes the states from assuming adequate and effective responsibility. *See,* Boyd, "Federal Protection of Endangered Wildlife Species", 22 Stan. L. Rev., 1289, 1291, 129ln.16 and 17 (1970), and H. Ryden, *America's Last Wild Horses,* 251-253 (1970). Furthermore, such problems frequently have a national flavor or character

to them and have a gravity and urgency which makes questions of competing state-federal jurisdiction seem inconsequential, such as the preservation of the American bald and golden eagles, effected by the Bald Eagle Protection Act, 16 U.S.C. §§668 *et seq.* (1970).

In the preamble to the Wild Free-Roaming Horses and Burros Act of 1971, Congress found and declared that wild free-roaming horses and burros are an important national resource, "symbols of the historic and pioneer spirit of the West", and, by implication, that preservation of them is an objective of national concern (16 U.S.C. §1331). The Congress has chosen the protective scheme of the Wild and Free-Roaming Horses and Burros Act as the instrument by which this national policy is to be fulfilled. In such circumstances, as Mr. Justice Holmes observed, "it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found . . . . It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act." *Missouri v. Holland,* 252 U.S. 416, 433, 435 (1920) (dictum), *quoting from Andrews v. Andrews,* 188 U.S. 14, 33 (1903).

CONCLUSION

For the foregoing reasons, and for those found in the brief of Appellant, Rogers C.B. Morton, the decision of the United States District Court for the District of New Mexico should be reversed.

Respectfully submitted,

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